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Summary record of the 2363rd meeting
Held at Headquarters, New York, on Wednesday, 29 March 2006, at 11 a.m.

Chairperson: Ms. Chanet

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The meeting was called to order at 11.10 a.m.

General comments of the Committee (*continued*)

Draft general comment on article 14 of the Covenant (*continued*) (CCPR/C/GC/32/CRP.1)

III. Fair and public hearing by a competent, independent and impartial tribunal

1. **Mr. Kälin**, speaking as Rapporteur for the draft general comment on article 14, recalled that under the heading of a fair and public hearing by a competent, independent and impartial tribunal the Committee had already discussed paragraphs 13 to 20 in relation to aspects of independence and impartiality of judges and the problems of military and special courts. Paragraphs 21 to 26 dealt with other aspects of a fair hearing, beginning with the issue of "faceless judges", and paragraph 27 discussed the presumption of innocence, which was as far as he had gone in the drafting. If the Committee made good progress it might be able to complete its first reading of the draft general comment before the end of the year.

Paragraph 21

2. **Mr. O'Flaherty** said that he found the expression "faceless judges" to be too colloquial and proposed that it should be deleted. He would also suggest adding "for instance" in the first line, so that the sentence would read: "Some countries have resorted, for instance within measures taken to fight terrorist activities, to special tribunals composed of anonymous judges".

3. **Mr. Amor** said that he had serious problems with paragraph 21. It was true that some of the Committee's older jurisprudence condemned "faceless judges", but anonymity of judges had become a sensitive issue in some parts of the world. Some judges, for example, were reluctant to be identified when sitting in trials of individuals accused of terrorist acts because they might become targets for retaliation. Although "faceless" judges might not be independent and impartial, there was a serious risk that judges whose identity was known to the accused might not be impartial, either, since fears for their safety might bias their judgement and cause them to be either too lenient or too harsh. The Committee could perhaps take a more flexible approach, allowing for the practice with appropriate safeguards, such as an independent authority that would be aware of the identity of the "faceless" judges and could ask them to stand down in the interests of justice if there was any risk of a lack of impartiality. He would therefore propose adding a clause after the words "composed of anonymous judges" that would read: "if no independent authority could verify the identity of the judges or ensure that they recused themselves, when necessary, in the interests of justice".

4. **Mr. Ando** said that he agreed with most of the points made by Mr. Amor. In his capacity as Special Rapporteur for Follow-up on Views he had been hearing from authorities of some States parties that anonymity was the only way to ensure the security of judges in some circumstances and indeed to guarantee their impartiality. He was not sure whether he would adopt Mr. Amor's solution, but the Committee needed to be aware of the problem and add some language to recognize it.

5. **The Chairperson**, speaking in her personal capacity, said that the Committee must be consistent with its own jurisprudence.

6. **Mr. Shearer** said he understood that in some cases anonymity might be necessary for judges in order to avoid assassination or corruption. Consistency with its jurisprudence was important, but, in fact, in the two communications cases referred to in footnote 36 the Committee's point had been that the State party had not specifically derogated from the Covenant under a state of emergency. He thought that paragraph 21 could admit anonymity of judges as a derogation and refer to the Committee's general comment No. 29 on states of emergency. In such cases the country must expressly derogate and must adhere to the principle of proportionality. The Committee could not simply make a blanket condemnation of the practice, but exceptions must be subject to rules. Mr. Amor's suggestion concerning an independent authority might be mentioned as an example of how to ensure legality even under exceptional circumstances.

7. He would be reluctant to eliminate the expression "faceless judges". It was well known, and there might be two different situations, one in which the accused could see the judges, even though their identities were withheld, and another in which the judges actually sat behind a screen and never appeared.

8. **Ms. Wedgwood** noted that it was not uncommon to have anonymous jurors, even in the absence of a

state of emergency, for example in trials of drug traffickers who belonged to organized gangs. She would be loath to say that anonymity of jurors would require a specific derogation from the Covenant and would favour language that made it clear that jurors were not meant. It was important that participants in a trial should be able to focus on the issues without fears for their own safety. However, she wished to reserve judgement on Mr. Shearer's suggestion concerning derogation, because it seemed to invite States to declare a state of emergency more frequently, an action which, notwithstanding the principle of proportionality, opened up temptations to derogate broadly from due process rights. She would prefer language about "independent safeguards of integrity and accountability" and "exceptional and rare circumstances".

9. **Mr. Rivas Posada** said that, although it was important to avoid a blanket condemnation of anonymity, the Committee could not fly in the face of its own jurisprudence and its general comment on states of emergency. Tribunals composed of anonymous judges should not become a permanent institution. After lengthy public debate it had been decided in his own country that such tribunals were unconstitutional. They must be seen as a last resort, and he therefore agreed that they should only be admitted by derogation under declaration of a state of emergency.

10. **Sir Nigel Rodley** said that, although he did not have the relevant Views at hand, he seemed to recall that the Committee had found a violation of the Covenant to lie not in the anonymity of the judges alone, but in the combination with other elements of the constitution and procedures of the courts. It might be useful to elaborate on the whole cluster of issues related to special courts. If the Committee wished to single out the dimension of "facelessness", it would have to allow for exceptions. Yet if it spelled out possible exceptions it might seem to be inviting States parties to resort to that method.

11. **Mr. Bhagwati** said that while "faceless" justice was a very dangerous practice in hands of authorities bent on concealment or the silencing of opposition, it was necessary in some cases to have anonymous judges for reasons of security. No one would be willing otherwise to serve as a judge. The practice must, however, be reined in by the kind of conditions Sir Nigel spoke of, and the text should specify them. A prior declaration of a state of emergency in the sense of article 4 was perhaps going too far.

12. **The Chairperson**, noting that the formulation should be restrictive and should not encourage States to make such courts normal, said that the paragraph should be redrafted in the light of what Mr. Kälin could tell the Committee, after reviewing the various Peruvian communications, about the context in which it had condemned the practice of "faceless judges".

13. **Mr. Amor** observed that while the Committee should be consistent with its own jurisprudence, it should not be dogmatic about it. Once taken, a position could later be nuanced, although the limits of any such departure from precedent should be carefully spelled out. The essential point in paragraph 22 was to allow for the possibility of resorting to "faceless judges", but only in exceptional circumstances, and only after the declaration of a state of emergency.

14. **Mr. Ando**, recalling that when the Committee had discussed its general comment on article 4 there had been suggestions that the rights under article 14 should be made non-derogable, said that the point was to decide how to maintain the essential element of a fair trial in any special tribunals.

15. **Mr. Kälin** said that, after reviewing the Peruvian communications referred to in footnote 36, the Committee in the Polay Campos decision had used strong language as to why trials with anonymous judges were incompatible with article 14, but it had spelled out the specific situation there, namely, a trial in a remote prison, with the public excluded and presumed members of the armed forces on the court. The problem was that there probably never were trials by "faceless judges" that were not tainted by such additional elements. His own inclination would be to be quite strict as to the incompatibility with article 14, in which case a derogatory clause under a state of emergency made sense. It was dangerous to allow exceptions under the Covenant to such an important principle. He would redraft paragraph 21 to make the Committee's jurisprudence clearer, indicate what the problems were and then refer to derogation.

16. **The Chairperson** suggested, accordingly, that consideration of paragraph 21 should be deferred.

17. *It was so decided.*

Paragraph 22

18. **Sir Nigel Rodley** said that, in the first sentence, he found the reference to other principles confusing and unnecessary and would amend the sentence to read simply: "In addition, the notion of fair trial includes the guarantee of a fair and public hearing". Also, it was not clear, in the second sentence, whether it was the public, its attitude or the courtroom that was "not controlled".

19. **Mr. Kälin** said that he accepted Sir Nigel's reformulation of the first sentence, and that the words "not controlled" should be replaced by the phrase "tolerated by the court", to make the meaning clear.

20. **Mr. Amor** observed that the expression of hostility by the public in a courtroom was not the only possible disruption of the proceedings that would militate against a fair hearing.

21. **The Chairperson**, speaking in her personal capacity, said that indeed any situation contrary to the overall decorum of the proceedings was at issue.

22. **Mr. Wieruszewski** said that a public uproar in a courtroom could be so disruptive as to interfere with the right of defence in a trial. He recalled a communication in which the Committee had found a violation of article 14 on that ground. Some public demonstrations could easily be controlled by the judge, but others could seriously undermine the proceedings, and the distinction should be made in the text.

23. **Mr. Shearer** said that he believed a reference should also be added to prejudicial pre-trial publicity in the media.

24. **The Chairperson**, concurring, said that the Committee's concluding observations on a report by Finland, condemning mid-trial public statements by the prosecution could be referred to in phrasing that idea as well.

25. **Mr. Wieruszewski**, supported by **Mr. Kälin**, said that Mr. Shearer's point and the problem of having the outcome of a trial prejudged by the presiding judge or the prosecution — all too common in some countries — was dealt with later, in paragraph 27 concerning the presumption of innocence, and it belonged there. The general comment would, after all, be read as a whole.

26. **Ms. Wedgwood** said that the formulation of the last phrase of the second sentence, about racist attitudes of a jury that were tolerated by the tribunal, seemed tendentious and almost invasive of the sacrosanct common-law principle of the complete independence of a jury in reaching its decisions. On the other hand, it was always permissible, during the jury selection process, to eliminate any juror who seemed prejudiced; thus the reference should be to the assurance that candidates for a jury did not evince any overt racial prejudice.

27. Regarding the idea of a fair and public hearing in the first sentence of the paragraph, she recalled that under the Third Geneva Convention, a hearing room could be closed during a court martial in circumstances involving national security issues; perhaps the text could accommodate such a possibility.

28. **Sir Nigel Rodley** said that the exclusion of the public under certain circumstances was dealt with in paragraph 26. Ms. Wedgwood's other point, however, about racially biased selection or composition of juries could indeed be added in paragraph 22.

29. **Mr. Kälin** said that paragraph 26 was the proper place for a reference to the exclusion of the public, and that there was no need to refer there to the Third Geneva Convention because the point was already in the text of article 14 itself.

30. **Mr. Solari Yrigoyen** asked if, as part of the notion of a fair trial, it could not also be stated that judicial decisions must be free of any restrictions, improper influences, pressures, threats or interferences, direct or indirect, from any quarter or for any reason — along the lines of principle 2 of the United Nations Basic Principles on the Independence of the Judiciary.

31. **Mr. Kälin** said that he would try to find a way of incorporating Mr. Solari Yrigoyen's idea in the second sentence by stating the general principle that fairness meant freedom from pressure. In accordance with various other suggestions made, he would amend the rest of that sentence, after the phrase "a hostile attitude of the public in the courtroom tolerated by the court[17]", to read: "and/or affecting the right to defence or other manifestations of hostility, or with racially biased jury selection or expressions of racist attitudes by a jury[18] that are tolerated by a tribunal".

Paragraph 23

32. **Mr. Amor** said that the paragraph was based on the Committee's jurisprudence, but one element was

missing, namely, that of manifest error, which was an established concept in comparative jurisprudence. It was not covered by the notions of arbitrariness and independence and should be more explicitly dealt with in the paragraph.

33. **The Chairperson**, speaking in her personal capacity, supported Mr. Amor's suggestion but said that there could be a problem with it. The existing language in the paragraph was very standard for the Committee and it was not easy to change fixed formulas. It was also not clear that the communications that related to article 14 and formed the basis for the general comments under review made reference to the concept of manifestly erroneous decisions. Rather than change the existing standard language, perhaps Mr. Amor's suggestion should simply be added to the paragraph.

34. **Mr. Kälin** said that it would be best not to change the standard formula, but that a sentence could be added referring to manifestly erroneous decisions.

Paragraphs 24 and 25

35. **Mr. Ando** said, with reference to paragraph 25, that the link between the public nature of hearings and the desired transparency of judicial proceedings should be made more explicit.

36. **Mr. Amor** suggested, with reference to the last sentence of paragraph 25, that the first part of the sentence should be changed to read: "The requirement of a public hearing does not necessarily apply to appellate proceedings ...".

37. **Sir Nigel Rodley** said he supported Mr. Amor's suggestion but did not understand the last part of the third sentence of paragraph 25.

38. **Mr. Kälin** took note of all the comments and agreed with Sir Nigel Rodley that there was something missing in the third sentence of paragraph 25 as it stood. He would check it against the communications.

Paragraphs 26 and 27

39. **Mr. Shearer** welcomed the fact that a number of his earlier concerns were covered by the text of paragraph 27. He suggested that the language in the penultimate sentence of the paragraph should be expanded to cover private actors as well. They too, especially the media, should exercise restraint in making pronouncements before and during a trial that might prejudge the outcome.

40. **Mr. Amor** said he shared Mr. Shearer's concerns about public and private actors making public statements declaring the accused guilty.

41. **The Chairperson**, speaking in her personal capacity, recalled that some States had the accused brought into court wearing a prison suit, already presenting him as a criminal and undermining the presumption of innocence.

42. **Sir Nigel Rodley** suggested changing the wording in English of the middle of the second sentence of paragraph 27 to read: "imposes the burden of proving the charge on the prosecution". Expanding on the point made by the Chairperson about the appearance of the accused in court and the presumption of innocence, he mentioned the practice of shackling the accused in some cases.

43. **Mr. Khalil** said that the main problem was with public actors. In any case, in many countries the most active media were State-owned.

44. **Ms. Wedgwood** said that, although she was sympathetic to Mr. Shearer's concern with the actions of some private actors, they had no obligations under the Covenant; States parties had no obligation to control private actors, including the media, nor would the Committee want them to exercise such control. There were two competing freedoms in operation, namely, free speech and fair trial.

45. **Mr. Kälin** said that private actors could indeed be a problem, but he agreed with Ms. Wedgwood that the Committee needed to be careful. He hoped Mr. Shearer could give him some appropriate wording.

46. **The Chairperson** said that the Committee had completed its work on the draft general comment for the current session.

The meeting rose at 12.30 p.m.